No. 12586

In the United States
COURT OF APPEALS
For the Ninth Circuit

OSCAR ANDERSON and
ALASKA FISHERMEN'S UNION,

Appellants,

v.

M. P. MULLANEY, Commissioner of Taxation
of the Territory of Alaska,

Appellee.

Upon Appeal from the District Court for the Territory of Alaska, First Division

BRIEF FOR APPELLEE

FILED

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Note:

The relevant portions of Chapter 66, Session Laws of Alaska, 1949, are set out in Appendix A. The uniformity clause of Section 9 of the Alaska Organic Act (48 USCA §78) is set out in Appendix B.

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OPINION BELOW

The opinion of the District Court, as yet unreported, will be found at R. 14-18.

JURISDICTION

This is a suit to enjoin the appellee from enforcing the provisions of Chapter 66, Session Laws of Alaska, 1949, and to have declared unconstitutional and invalid that portion of Chapter 66 which requires every

nonresident fisherman, as that term is defined therein, to pay a license fee of $50 for the privilege of becoming engaged as a fisherman in the Territory of Alaska (R. 2-6). Judgment and decree was entered on April 18, 1950, sustaining the validity of the Act in its entirety and dismissing the complaint and amended complaint (R. 23). An appeal was taken on May 15, 1950, by filing with the district court a notice of appeal (R. 25). The jurisdiction of the district court was invoked under the Act of June 6, 1900, c. 786, §4, 31 Stat. 322, as amended, 48 USCA §101. The jurisdiction of this court rests on §1291 of the New Federal Judicial Code.

QUESTION PRESENTED

Whether Chapter 66, Session Laws of Alaska, 1949, is a valid exercise of the taxing authority of the Territory.

STATEMENT

This action was instituted by appellants on May 26, 1949, to enjoin the enforcement of Chapter 66, Session Laws of Alaska, 1949, and to have declared invalid that portion of Chapter 66 which requires each nonresident fisherman, as that term is defined therein, to pay a license fee of $50 before becoming engaged as a fisherman in the Territory of Alaska (R. 2-6). Appellant, Alaska Fishermen's Union, brought this action for the benefit of those of its members who are

nonresident fishermen and who are employed by fish packing companies in Alaska to work as gillnet fishermen, trap fishermen and as crews of tenders and other floating equipment used in handling fish (R. 2-3). Appellants' principal claim of invalidity of Chapter 66 is based upon what they allege to be an unlawful discrimination against nonresident fishermen wherein a $50 fee is imposed upon nonresidents and only a $5 fee upon residents.

On January 19, 1950, this case came before the court to perpetuate the testimony of seven witnesses on behalf of appellee (R. 29). This testimony was recorded, and as reduced to narrative form, was offered and admitted in evidence at the trial (R. 10-14). Trial was had on March 16, 1950, at which time appellants introduced testimony in support of their complaint and appellee introduced testimony in support of the affirmative defenses contained in his amended answer (R. 46-151). On March 21, 1950, the court issued an opinion holding that Chapter 66, Session Laws of Alaska, 1949, was valid in its entirety (R. 14-18). Findings of fact and conclusions of law were filed in accordance with the court's opinion (R. 18-23), and on April 18, 1950, judgment and decree was entered sustaining the validity of Chapter 66 and dismissing appellants' complaint and amended complaint (R. 23-24). This appeal followed (R. 25).

SUMMARY OF ARGUMENT

I.

Chapter 66, Session Laws of Alaska, 1949, an Act providing for the licensing of fishermen in Alaska, is a valid exercise of the legislative authority of the Territory. Under Section 3 of the Alaska Organic Act (Act of Aug. 24, 1912, c. 387, §3, 37 Stat. 512, 48 USCA §24) the territorial legislature has the express authority to impose a license tax on fishermen, *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49; *Anderson v. Smith*, 71 F(2) 493; and since the classification between resident and nonresident fishermen in this Act satisfies the requirements of the equal protection clause of the Fourteenth Amendment to the United State Constitution, neither Section 9 of the Alaska Organic Act (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, as amended, 48 USCA §78), nor the Civil Rights Act (R.S. §1977, 8 USCA §41), have been contravened. *Alaska Steamship Co. v. Mullaney*, 180 F(2) 805, 817-818; *Martinsen v. Mullaney*, 85 F. Supp. 76, 79.

A. Since the legislature's chief objective in taxation is to obtain a fair distribution of the cost of government, *Welch v. Henry*, 305 U. S. 134, 144, the uncontradicted proof that almost insuperable difficulties must be met by appellee and his agents in collecting or attempting to collect the tax from nonresident fishermen, which do not have to be met with respect to the residents, fully supports a basis for the imposition of a higher tax on the former—one that

rests on substantial differences bearing a logical relation to the object of the legislation. *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415. Administrative convenience and expense in the collection of the tax are alone a sufficient justification for the difference in treatment given. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 511.

B. The fact that perfect uniformity may not have been achieved does not invalidate the Act. Equal protection has never required the legislature, with mathematical accuracy, to make meticulous adjustments in distributing the burden of government, *Welch v. Henry*, 305 U. S. 134, 145; it is not a valid objection to the classification, therefore, that appellee has not proved that the differential between the nonresident and resident tax is exactly equal to the difference in the cost of collection between the two classes. Sufficient facts have been produced by appellee to raise a presumption of constitutionality of the Act; and appellants, in attacking the legislative arrangement, have completely failed to assume the burden of negativing every conceivable basis that might support it. *Madden v. Kentucky*, 309 U. S. 83, 88.

C. In some cases a classification of taxpayers may be upheld as having a fair and substantial relation to a constitutional non-fiscal object. *Rapid Transit Corp. v. New York*, 303 U. S. 573, 587. In requiring a higher tax from the nonresident fishermen, the legislature could well have intended to encourage the

settlement of the Territory—a legitimate end of governmental action. *Haavick v. Alaska Packers Assn.*, 263 U. S. 510, 515.

II.

What has been already said with respect to the classification as it relates to equal protection, disposes of any contention that there is anything in the Act that violates the due process requirements of the Fourteenth Amendment. *Fox v. Standard Oil Co.*, 294 U. S. 87, 103. Nor is the amount of the nonresident tax so great as to deprive the nonresidents of their right to fish, guaranteed by the White Act (Act of June 6, 1924, c. 272, §1, 43 Stat. 464, 48 USCA §222). One who averages net earnings of $2500 for a fishing season of twenty days, or even one who earns $3500 during a season of from four to five months, can hardly contend that a tax of $50 is so exhorbitant as to "practically prohibit . . . or interfere with the exercise of the right granted by Congress." *Anderson v. Smith*, 71 F(2) 493, 495. There is a considerable difference between the $50 tax under the territorial Act and the $2500 fee exacted from nonresident fishermen in South Carolina which was found to be unreasonable and prohibitive in *Toomer v. Witsell*, 334 U. S. 385.

III.

Under no circumstances can the Act be construed as burdening interstate commerce. The business of fishing is purely a local business, subject to local taxation,

and is clearly distinguishable from the business of shipping fish in interstate commerce. Cf. *Oliver Mining Co. v. Lord*, 262 U. S. 172, 178-179. The taxable event—the taking of the fish—occurs before the fish have entered the flow of commerce. *Toomer v. Witsell*, 334 U. S. 385, 394-395.

IV.

The assertion that the Act adversely affects the uniformity of general maritime law has already been disposed of by what this court said in the case of *Alaska Steamship Co. v. Mullaney*, 180 F(2) 805, 812-814. The "essential features of an exclusive federal jurisdiction," *Just v. Chambers*, 312 U. S. 383, 392, are in no way involved in this legislation.

ARGUMENT

I.

CHAPTER 66, SESSION LAWS OF ALASKA, 1949, AN ACT PROVIDING FOR THE LICENSING OF FISHERMEN IN ALASKA, IS A VALID EXERCISE OF THE LEGISLATIVE AUTHORITY OF THE TERRITORY, AND DOES NOT VIOLATE THE ORGANIC ACT OF ALASKA, THE CIVIL RIGHTS ACT OR THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the Act of June 26, 1906 (c. 3547, 34 Stat. 478 *et seq.* as amended, 48 USCA §230 *et seq.*), Congress exercised its legislative power over fisheries in the Territory of Alaska by regulating the methods by which fish could be caught and by providing for a system of license taxes on the business of canning,

curing and preserving fish. In 1912 Congress, in transferring legislative power to the Territory, provided in Section 9 of the Organic Act (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, 48 USCA §77) that such power shall extend to all rightful subjects of legislation. Upon this express delegation of legislative authority there were placed some specific limitations, one of which was that the legislature should not have the power to alter, amend, modify or repeal the fish laws of the United States applicable to Alaska. *Organic Act of Alaska*, Sec. 3 (Act of Aug. 24, 1912, c. 387, §3, 37 Stat. 512, 48 USCA §24). In this same section, however, it was further provided that this limitation of authority should not prevent the legislature from imposing other and additional taxes and licenses; and this latter provision, it has been held, constituted an "express and unlimited authority" to tax, *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49, an authority that could validly be extended to the licensing of fishermen. *Anderson v. Smith*, 71 F(2) 493. Chapter 66, Session Laws of Alaska, 1949, is, therefore, fully within the legislative authority of the Territory unless it can be said to contravene the Constitution of the United States, the Civil Rights Act (R.S. §1977, 8 USCA §41), or some provision of the Organic Act of Alaska.

Section 9 of the Organic Act, which appellants maintain is violated by Chapter 66, contains a provision that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under gen-

eral laws . . ." (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, as amended, 48 USCA §78.) The district court held that this provision does not apply to license taxes (R. 16), but even assuming that it does, such a provision "requires no greater measure of uniformity and equality than does the equal protection requirement of the Fourteenth Amendment." *Alaska Steamship Co. v. Mullaney*, 180 F(2) 805, 817-818. The same is true as to the requirements of the Civil Rights Act. *Martinsen v. Mullaney*, 85 F. Supp. 76, 79. Consequently, the arguments that the Act contains arbitrary classifications and discriminates against nonresident fishermen should be approached with the assumption that the validity of the Act must be judged by the same standards of equality and uniformity demanded by equal protection that would be applied in the case of similar legislation by a state. *Alaska Steamship Co. v. Mullaney, supra*, p. 818.

A. The classification in the Act between resident and nonresident fishermen is fully justified because of the increased enforcement burden placed on the Territory by the nonresidents.

The chief objective of taxation being an equitable distribution of the cost of government among those who enjoy its benefits, *Welch v. Henry*, 305 U. S. 134, 144, the equal protection clause of the Fourteenth Amendment logically contemplates rather than forbids the "greatest freedom in classification," *Madden v. Kentucky*, 309 U. S. 83, 88; because only by classifying for purposes of taxation can true practical

equality be attained. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 228. Thus there is reason for the rules established by the United States Supreme Court: that a classification in a tax law is valid if it is founded upon a reasonable distinction or if any state of facts reasonably can be conceived to justify it, *Tax Commissioners v. Jackson*, 283 U. S. 527, 537; if it rests upon some ground of difference having a fair and substantial relation to the object of the legislation, *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415, *Louisville Gas & Elec. Co. v. Coleman*, 277 U. S. 32, 37; when the legislature withholds the burden of a tax to foster what it conceives to be a beneficent enterprise, *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 512; or when the classification has a reasonable relation to a legitimate end of governmental action, *Welch v. Henry*, 305 U. S. 134, 144. All that equal protection demands is that the selection of the classes be neither capricious nor arbitrary; if it rests upon a reasonable consideration of difference of policy, then standards of equality are satisfied. *Tax Commissioners v. Jackson, supra, p.* 537.

In this case the evidence fully supports a rational basis for the imposition of a higher license tax on nonresident fishermen than on residents. Thousands of nonresident fishermen come to Alaska each year (R. 52-53, 69) and engage in fishing for salmon in Alaska during the fishing season which varies from twenty days in Bristol Bay (R. 11, 80-81) to four or five months elsewhere (R. 10-11), during which time

they enjoy the protection of local government. But in exacting from such nonresidents their fair share of the cost of governmental protection, by the fishermen's license tax, extraordinary and almost insuperable difficulties are encountered by appellee and his agents.

Nonresident trollers come to Alaska each year in their own power boats and fish along the many miles of Alaska coastline. They own no property and have no homes in the Territory (R. 85-86), they are not required by shipping laws to enter or clear upon arrival in or departure from the Territory (R. 107), and their boats are not only large and in first-class shape (R. 101), but are supplied before leaving the States for the fishing grounds in Alaska with necessary staples and fishing gear (R. 99). These nonresident trollers not only neglect to purchase the nonresident fishing licenses, but even deliberately evade such payment by dodging the tax collector (R. 99-107), by warning each other by radiophone of his proximity (R. 99-100, 105) and by purchasing resident fishing licenses (R. 107).

The circumstances, however, with respect to resident trollers are entirely different and no such tremendous enforcement problems must be met. Since the residents have homes in the Territory and live in villages and towns where agents of appellee are situated, it is a simple matter for appellee's deputies to collect the tax before the fishing season opens (R. 97-98). Violators among the residents can easily be

apprehended at their places of residence after the season is closed (R. 108).

Much of the same burden and inconvenience is encountered with respect to collection of the license tax from nonresident gillnet fishermen, trap watchmen and tendermen. Again, these nonresident fishermen will not voluntarily pay the tax, and again, the tax collector must seek them out by the process of covering by boat or airplane many miles of area (R. 109). The efforts to enforce the Act here, however, are even more unlikely to be met with success than in the case of trollers because of the short fishing season of approximately twenty days (R. 80-81). Also, as in the case of the nonresident trollers, the nonresident gillnet fishermen will purchase resident licenses in an attempt to avoid the fee that they are required to pay (R. 109). And there is still difficulty in enforcement with respect to nonresidents employed by canneries in Bristol Bay, where license fees are ordinarily collected for the Territory by the canneries (R. 110). If all the fees from all nonresident fishermen there were collected pursuant to this plan, all would be well, but as the evidence shows, even here there is evasion (R. 110-113). The same situation exists with respect to nonresident trap watchmen employed by canneries (R. 114).

As in the case of the resident trollers, there is no real enforcement problem with respect to resident gillnet fishermen. Those who are not employed by canneries ordinarily purchase licenses before the fishing

season opens (R. 108); and in the cases where canneries deduct the license fees from wages, those persons who have fished only for a short time, from whom no deductions are made by the canneries, and who thus evade payment of the tax, (R. 110-111), are not ordinarily resident fishermen but nonresidents. As the evidence shows, the resident gillnetters who work for canneries during the season at Bristol Bay need licenses to fish in a later season of the year (R. 112).

In view, therefore, of the showing that nonresident fishermen own no property and have no homes or other ties in Alaska, that they come to the Territory only for a relatively short period of time and depart therefrom immediately after the fishing season closes, that they deliberately evade the law by refusing to pay the license tax and by throwing obstacles in the path of the tax collector who must seek them out along the thousands of miles of Alaska coastline, it is little wonder that ninety percent of the cost of collecting the taxes under Chapter 66 is incurred in collecting or attempting to collect them from the nonresident fishermen (R. 21, 120). This certainly constitutes a valid basis for the classification in the Act—one that rests on substantial differences bearing a rational relation to the object of the legislation. *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; *Louisville Gas & Elec. Co. v. Coleman*, 277 U. S. 32, 37. Administrative convenience and expense in the collection of the tax are alone a sufficient justification for the

difference in treatment given. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 511; *Madden v. Kentucky*, 309 U. S. 83, 89-90; *South Porto Rico Sugar Co. v. Buscaglia*, 154 F(2) 96, 100. At the very least a state of facts can reasonably be conceived to justify the imposition of a higher tax on nonresident fishermen, *Tax Commissioners v. Jackson*, 283 U. S. 527, 537, and there has been absolutely no showing by appellants that such legislative action constitutes a hostile or oppressive discrimination against them. See *Madden v. Kentucky, supra*, p. 88.

B. The classification in the Act is not invalid on the ground that uniformity may not have been achieved with scientific accuracy.

It is not true, as appellants suggest, (Appellants' Brief, pp. 8-10, 14-15) that in order to justify the classification in the Act, appellee must have kept a complete record showing a detailed comparative analysis, between resident and nonresident fishermen, of the myriad items and operations involved in the process of collecting taxes from them, or that he must prove that the differential between the $50 fee imposed on nonresidents and the $5 fee on residents is equal to the difference between the cost of collecting the nonresident tax and the cost of collecting the resident tax. Nearly every revenue measure contains classifications, and if in order to write a valid law under requirements of uniformity, the legislature were forced to consider with mathematical exactitude the differences between the classes, then it could hardly

function as a legislature. To interpret uniformity and equality as being such a narrow restrictive limitation on legislative authority would, in effect, be striking at the government's most vital function—its power to raise revenue for its continued existence.

All that is necessary to sustain this classification is the uncontradicted proof that the inconvenience, burden and expense in enforcing the provisions of the Act are substantially greater with respect to nonresidents than to residents, and that the relation, therefore, between means and end in this legislative action is not "wholly vain and fanciful, an illusory pretense." *Williams v. Mayor*, 289 U. S. 36, 42. Equal protection has never demanded that the legislature "maintain rigid rules of equal taxation, . . . resort to close distinctions, or . . . maintain a precise scientific uniformity . . ." *Welch v. Henry*, 305 U. S. 134, 145. It has been repeatedly held that an iron rule of equal taxation is not required by the constitution. *Tax Commissioners v. Jackson*, 283 U. S. 527, 537. See also *Lawrence v. State Tax Commission*, 286 U. S. 276, 284; *General American Tank Car Corp. v. Day*, 270 U. S. 367, 373-374; *Travelers' Insurance Co. v. Connecticut*, 185 U. S. 364; *State Railroad Tax Cases*, 92 U. S. 575, 612.

From the evidence produced by appellee, there is raised a presumption of the constitutionality of the legislature's scheme of attaining its legitimate objective—an equitable distribution of the cost of government. This presumption of constitutionality "can be

overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis that might support it." *Madden v. Kentucky*, 309 U. S. 83, 88. This burden appellants have made no attempt to assume.

Nor are the words "a differential which would merely compensate the State for any added enforcement burden they may impose" taken from the opinion in the case of *Toomer v. Witsell*, 334 U. S. 385, 399, any authority for appellants' view that in order to sustain the tax, the differential must be shown with mathematical certainty to equal the added enforcement cost that nonresidents impose. (See Appellants' Brief, pp. 14-15.) If this is appellants' contention, then what they are really saying is that in the *Toomer* case the United States Supreme Court has overruled a well established, and constantly adhered to, rule of law to the effect that equal protection does not require an iron rule of equal taxation, or that the legislature maintain a precise scientific uniformity and make meticulous adjustments in distributing the burden of government. The Supreme Court could scarcely have intended such a result in the *Toomer* case, for to so hold would be "to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the

Fourteenth Amendment was intended to assure." *Ohio Oil Co. v. Conway*, 281 U. S. 146, 159.

Other portions of the *Toomer* opinion should be examined. For instance, on p. 396 the following language appears:

> "By that statute South Carolina plainly and frankly discriminates against nonresidents, and the record leaves little doubt but what the *discrimination is so great that its practical effect is virtually exclusionary.*" (Italics supplied)

and on pp. 398-399, the court said:

> "Nothing in the record indicates that nonresidents used larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the State's general funds is devoted to shrimp conservation. *But assuming such were the facts, they would not support a remedy so drastic as to be a near equivalent of total exclusion* . . . We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the *severe discrimination* practiced upon them." (Italics supplied.)

Thus the real reason for the holding in the *Toomer* case appears. It was not merely the discrimination against nonresidents that caused the court to hold the South Carolina statute invalid; it was the fact that the discrimination was so great that it had the necessary effect of excluding nonresidents from fishing in that State. No such effect in the principal case is present or is even suggested by appellants. There

is an obvious distinction between a differential of $2475 in the *Toomer* case and $45 here. A fee of $2500 may well be exclusionary, but (as pointed out below in Point II of this brief) it can hardly be contended that a fee of $50 has the practical effect of depriving appellants' members of their right to fish in territorial waters.

C. The classification in the Act may also be justified as a legitimate means of fostering the development of the Territory.

In some cases a classification of taxpayers may be upheld as having a fair and substantial relation to a constitutional non-fiscal object. *Rapid Transit Corp. v. New York*, 303 U. S. 573, 587. No one could argue that there would be anything unconstitutional in imposing a $50 license fee on both resident and nonresident fishermen alike, and yet the imposition of only a $5 fee on the local fishermen engaged in the largest industry in Alaska is nothing more than the encouragement of settlement of the Territory, and must be sustained because fairly related to a legitimate end of governmental action. As Mr. Justice McReynolds stated in *Haavick v. Alaska Packers Assn.*, 263 U. S. 510, at p. 515:

> "It (the fishermen's license tax) applies only to nonresident fishermen; citizens of every state are treated alike. Only residents of the territory are preferred. This is not wholly arbitrary or unreasonable, and we find nothing in the Constitution which prohibits Congress from favoring

> those who have acquired a local residence and upon whose efforts the future development of the territory must largely depend."

It is enough, therefore, that the classification is reasonably founded upon or related to some permissible policy of taxation, *Roberts & S. Co. v. Emmerson*, 271 U. S. 50, 57, or that the legislature has decided to withhold the burden of a tax in order to foster what it conceives to be a beneficent enterprise. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 512. Cf. *Aero Transit Co. v. Georgia Commission*, 295 U. S. 285, 291-292.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT HAS NOT BEEN VIOLATED NOR HAVE APPELLANTS BEEN DEPRIVED OF THEIR RIGHT TO FISH IN THE WATERS OF ALASKA.

What has been said above with respect to the classification as it relates to equal protection disposes of any contention that the legislative scheme of classification violates due process requirements, *Fox v. Standard Oil Co.*, 294 U. S. 87, 103; *Rapid Transit Corp. v. New York*, 303 U. S. 573, 587, unless it is being asserted that without even considering the amount of the resident fee, the $50 nonresident fee is so excessive and unreasonable as to amount to a deprivation of property or liberty without due process of law. But even in this respect there is no violation of constitutional guaranties. Due process seldom is a limitation

on the discretion of the legislature in deciding the amount of a tax, unless from an examination of the statute it is clear, beyond any doubt, that the legislature has exercised, not its power of taxation, but some forbidden power such as confiscation of property or regulation of some matter beyond the legislature's concern; and these forbidden powers are not to be implied solely from the burden of the tax. *Magnano Co. v. Hamilton*, 292 U. S. 40, 46-47. In order to justify a court striking down a tax because of its alleged excessive burden, a statute under which the tax is levied must show on its face detailed regulation of a subject beyond legislative power, a showing which cannot be made here. See *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 42.

Nor is the amount of the nonresident tax so great as to contravene that portion of the White Act which guarantees to every citizen of the United States "the right to take . . . fish . . . in any area of the waters of Alaska where fishing is permitted . . ." (Act of June 6, 1924, c. 272, §1, 43 Stat. 464, 48 USCA §222). A gillnet fisherman who averages net earnings of approximately $2500 for a fishing season of twenty days (R. 11-13, 17, 80-81), or even a troller who averages approximately $3500 for a season of four to five months (R. 10-11, 17), can hardly in all seriousness contend that a tax of $50 is so exhorbitant and unreasonable as to "practically prohibit . . . or interfere with the exercise of the right granted by Congress," *Anderson v. Smith*, 71 F(2) 493, 495, particularly in

view of the fact that after the close of one particular fishing area, a fisherman can implement his earnings considerably by fishing in other parts of the Territory (R. 12-13, 86). There is a marked difference between the Alaska nonresidents' fishing tax of $50 and the $2500 fee exacted from nonresident fishermen in South Carolina which was found to be unreasonable in *Toomer v. Witsell*, 334 U. S. 385.

III.

THE ACT DOES NOT IMPOSE AN UNCONSTITUTIONAL BURDEN UPON INTERSTATE COMMERCE.

There is nothing in Chapter 66 which can be construed as an attempted regulation of interstate and foreign commerce, either expressly or by reason of constituting an unlawful burden thereon. Fishing is not interstate commerce but is simply a local business subject to local taxation, and is clearly distinguishable from the business of shipping fish in interstate commerce. Cf. *Oliver Mining Co. v. Lord*, 262 U. S. 172, 178-179; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 258-259; *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 182-183; *Western Livestock Co. v. Bureau*, 303 U. S. 250, 258. The taxable event—the taking of the fish—occurs before the fish have entered the flow of commerce. *Toomer v. Witsell*, 334 U. S. 385, 394-395. By no reasonable implication does this tax purport to regulate interstate commerce in fish or to control the movement of fishing vessels therein. *Mirkovitch v. Milnor*, 34 F. Supp. 409, 411.

Appellants' thought that there is a burden on commerce because the tax applies to "sizeable numbers . . . who assist the product in its process through the industry which is admittedly interstate in character" (Appellants' Brief, p. 16) is incorrect. Appellants do not state just who are the "sizeable numbers assisting the product in its process," and there is no showing in this record of any instance where the fisherman's license tax was demanded from one who was engaged in the processing aspect of the fishing industry in Alaska. As the district court pointed out in the case of *Martinsen v. Mullaney*, 85 F. Supp. 76, at p. 78:

> ". . . . it was the intention of the Legislature to comprehend all those classes identified or connected with the maritime aspect of the industry . . . that is, the taking, handling and delivery of the fish on the grounds, as distinguished from those engaged in shore operations, such as processing, canning and exporting."

Clearly the Act imposes a tax only on the local business of fishing, and does not by any reasonable implication purport to touch the processing part of the fishing industry which begins when the fish are delivered by fishermen to the canneries and cold storage plants.

Nor is there any merit to appellants' contention that the Act burdens interstate commerce because cannery companies are prohibited under Section 5 from employing, or purchasing fish from, fishermen who

are not licensed under the Act (Appellants' Brief, p. 16). Appellants are not cannery companies and are not being prosecuted for violation of Section 5 of the Act. A decision on the constitutional question involved there should await a case where those provisions are specifically applied to one who claims to be injured. *Watson v. Buck*, 313 U. S. 387, 402; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 346-347.

IV.

THE ACT DOES NOT CONSTITUTE AN UNWARRANTED INVASION OF THE ADMIRALTY AND MARITIME JURISDICTION OF THE UNITED STATES.

Although the point has not been argued, appellants do specify in their summary of their Statement of Points (Appellants' Brief, pp. 2-3) that Chapter 66, Session Laws of Alaska, 1949, is unconstitutional in that it violates Article 3(4), Section 2 of the Constitution of the United States. The assertion, however, that there is anything in the Act which runs counter to congressional policy as regards admiralty and maritime jurisdiction and thus adversely affects the uniformity of general maritime law, has already been sufficiently disposed of by this court in the case of *Alaska Steamship Co v. Mullaney*, 180 F(2) 805, 812-814.

Under the Act a tax is imposed upon those engaged in a local business, and the fact that certain fishermen may for some purpose be classed as seamen and thus

able to take advantage of certain congressional acts relating to maritime law, does not mean that they are thus forbidden to contribute to the cost of the local government that offers them protection. Congress, it may be admitted, has manifested its intention to occupy the entire field of general maritime law, but a local occupation tax which has no direct relation to or effect upon navigation or commerce of the sea, which claims nothing against the fishing vessel, which in no way attempts to regulate or interfere with the contract a crew member of a vessel has with its owner, and which has absolutely no effect upon the collection of a seaman's wages, can by no reasonable implication be said to interfere with or hinder congressional objectives in this field. Here the legislature has dealt with matters entirely unrelated to those covered by congressional enactments. The "essential features of an exclusive federal jurisdiction" are in no way involved. *Just v. Chambers*, 312 U. S. 383, 392.

CONCLUSION

Chapter 66, Session Laws of Alaska, 1949, is a valid exercise of the Territory's acknowledged power of taxation. In order to obtain an equitable distribution of the cost of government, the legislature has prescribed a classification that is fully within the bounds of permissible legislative action. Absolute and perfect equality may not have been achieved, but it has never been required that a taxing statute be scientifically accurate. It is sufficient that a fair and reasonable attempt has been made to distribute the burden of government by placing a higher tax on those who impose upon the government additional burden and cost in enforcing the statute under which the tax is levied. Chapter 66, Session Laws of Alaska, 1949, is, therefore, valid in its entirety and the decree of the district court should be affirmed.

Respectfully submitted,

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October 1950

APPENDIX A

Chapter 66, Session Laws of Alaska, 1949

* * *

Section 1. For the purposes of this Act, "fisherman" shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term "fisherman" shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling of fish.

Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a license so to do. License fees levied upon fishermen are as follows: Resident fisherman, $5.00; non-resident fisherman, $50.00. Such licenses shall run for one calendar year, and expire on December 31st of each year. For the purposes of this Act, a resident shall be any citizen who has resided in the Territory for 12 months immediately preceding application for such license and shall have been a bona fide inhabitant of Alaska for at least six months during each calendar year thereafter, and who maintains his place of abode in Alaska. A non-resident is a citizen who has not resided in Alaska for the 12 months im-

mediately preceding application for license or who maintains his principal business or place of abode outside of the Territory. Any person not a citizen of the United States is deemed to be an alien unless he possesses a valid declaration of intention to become such citizen.

Section 3. Licenses to fish shall be issued by the Tax Commissioner pursuant to written applications containing such information as may be required by the Tax Commissioner, and such licenses may also be issued by his deputies. * * *

Section 4. The Tax Commissioner is hereby authorized to appoint United States Commissioners, cannery or cold storage agents, fish buyers or other persons as his agents to take applications, issue the licenses and collect license fees hereunder, and with respect to such persons not employed on salary by the Tax Departmen, the Tax Commissioner is hereby authorized to establish reasonable and uniform rates of compensation for such services on a commission basis for issuance of each resident and non-resident license. The United States Commissioners and other agents shall monthly transmit to the Tax Commissioner all fees collected by them, less their authorized commissions, together with a full account of same. The Tax Commissioner shall not be liable for defalcation or failure to account for the fees so collected by any such agent, but shall require a bond in such sum as he may deem adequate, conditioned upon faithfully accounting for all moneys collected hereunder.

Section 5. It shall be unlawful for any person, association or corporation, or for the agent of any person, or for the officer or agent of any association or corporation, to have in his, their or its employ any fisherman who is not duly licensed under this Act or to purchase fish from any fisherman who is not so licensed. Each buyer of the fish shall keep a record of each purchase showing name of boat from which the catch involved is taken, amount purchased, and the names of all persons attached to the boat who participated in the trip on which the fish or shellfish were taken. Such records may be kept on forms provided by the Tax Commissioner, but must be kept in any event, and each person charged with keeping such records must report same to the Tax Commissioner in accordance with rules and regulations promulgated by him. Anyone violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction, punishable under the penalty clause of this Act.

Section 6. (a) The Tax Commissioner's deputies shall have full power to enforce this Act. Likewise the agents of the Fish and Wildlife Service, Department of the Interior, are hereby fully authorized to enforce this Act. (b) Licenses shall be subject to inspection, and shall, upon request by any officer authorized to enforce this Act, be exhibited to him. Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offen-

der shall be subject to a fine not exceeding $500.00 or imprisonment not to exceed six months, or to both such fine and imprisonment.

Section 7. This Act shall not apply to fishing for personal consumption but shall apply only to fishing for commercial purposes; * * *

* * *

Section 9. If any provisions of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 10. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 21, 1949.

APPENDIX B

Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, as amended, 48 USCA §78.

All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the true and full value thereof. * * *